NO. 82-2163

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1983

DOLORES BALL GARBIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE TRIAL COURT CORRECTLY EXCLUDED THE TESTIMONY OF THE EXPERT DEFENSE WITNESS BECAUSE THE PETITIONER FAILED TO MEET THE MINIMAL THRESHOLDS NECESSARY TO THE INTRODUCTION OF SUCH TESTIMONY?

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PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF FLORIDA

TO: Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Respondent, State of Florida, prays that the Writ of Certiorari to review a Final Judgment of the

Fourth District Court of Appeal of the State of Florida which court affirmed, without opinion, the conviction of Murder in the Second Degree, be denied.

OPINIONS BELOW

The Fourth District Court of Appeal issued its decision in the form: Per Curiam Affirmed (Petitioner's Appendix 1).

Petitioner filed a Motion For Rehearing to which Respondent filed a Response In Opposition contending Petitioner's Motion was essentially a reargument of the matters raised on direct appeal. (Respondent's Appendix 1). The Motion was denied.

Thereafter, a mandate was issued by the Fourth District Court of Appeal

in the State Court (Petitioner's App. 4).

JURISDICTION OF THIS COURT

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C.§1257(3) and this Court's Rules 17 through 23.

CONSTITUTIONAL AMENDMENTS INVOLVED

SIXTH AMENDMENT

The Sixth Amendment to the United States Constitution provides, inter alia:

> "In all criminal prosecutions, the accused shall enjoy the right . . .to have compulsory process for obtaining witnesses in his favor . . ."

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides, inter alia:

> ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF FACTS

Respondent accepts the Petitioner's Statement of the Facts but adds that the defense expert witness was never qualified in the area of the battered woman syndrome nor did the proffered testimony show how Petitioner's circumstances and reactions were consistent with such a syndrome.

REASONS FOR DENYING THE WRIT

The propriety of receiving into evidence expert testimony rests within the sound discretion of the trial court, United States v. Fosher, 590 F. 2d 281 (1st Cir. 1979), and where the testimony is not relevant and material, there is no abuse of that discretion in excluding it. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). In United States v. Valenzuela-Bermal, ___ U.S. ___, 102 S. Ct. 3340, 73 L. Ed. 2d 1193 (1982), this Court emphasized that:

> In Washington, this Court found a violation of this clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been relevant and material, and . . .vital to the

to the defense."
(emphasis in the original)

Indeed this Court held that more than mere absence of testimony is necessary to establish a Sixth Amendment violation. There must be a plausible showing by the defendant of how the testimony would have been both material and favorable to his defense. See also United States v. Verkuilen, 690 F. 2d 648, 659 (7th Cir. 1982) (in which the court determined that there is no violation of the rights of an accused unless the potential witnesses could have provided relevant and material testimony to the defense); United States v. Fosher, 590 F. 2d 381, 383 (1st Cir. 1979) (in which the court excluded expert testimony because

of the limited reliability and relevance, and because the testimony could have created a substantial danger of undue prejudice); United States v. DeStefano, 476 F. 2d 324, 330 (7th Cir. 1973) (in which the court held that there is no constitutional violation of the Sixth Amendment right unless the excluded witness could have produced relevant and material testimony for his defense).

The case at bar is unlike the situation in Washington in which a state procedural statute totally precluded state witnesses from testifying despite a showing that the testimony of such witnesses was relevant and material to the defense. In the case

at bar, the testimony would have been admissible if that testimony had been shown to be material and relevant. However, Petitioner failed to meet the threshold requirement for admissibility. She failed to demonstrate that her case fell within the parameters of Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA), cert. denied, 415 So. 2d 1361 (Fla. 1982).

Hawthorne involves expert testimony concerning the "battered woman syndrome." Hawthorne makes the admission of expert testimony concerning the battered woman syndrome "subject to the trial court determining that [the witness] is qualified [as an expert in the battered woman's syndrome], and that the

subject is sufficiently developed and can support an expert opinion." Id. at 806. In the case at bar, the Petitioner never qualified the psychologist as an expert on the battered woman syndrome. The defense proffer failed to show how the circumstances and reactions of the Petitioner were consistent with the battered woman syndrome. Hence, Hawthorne is inapplicable.

The right to present a full defense and to receive a fair trial does not entitle a criminal defendant to place before the jury evidence which is normally inadmissible. United States v. Bifield, 702 F. 2d 351 (2nd Cir. 1983). Accordingly, where the Petitioner failed to

establish the relevancy and materiality of the testimony and to qualify the expert in the area of the battered woman syndrome, the Petitioner cannot now claim that the court under the Hawthorne rationale abused its discretion in failing to allow the Petitioner to call the psychiatrist as a defense witness. Because there was no abuse of discretion and no violation of the Sixth Amendment right, this Court should deny the Writ.

CONCLUSION

The ruling by the trial court excluding the testimony of a defense witness was correct because that testimony was neither relevant, nor probative, nor material and, consequently, there was no denial of the rights of the Petitioner.

There was no abuse of discretion constituting a denial of due process because the Petitioner failed to meet the threshold requirement of materiality and relevance mandated by existing case law.

The Writ of Certiorari should be DENIED.

Respectfully submitted,

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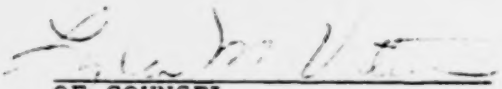
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief in opposition to Petition for Writ of Certiorari has been furnished this _____ day of _____, 1983, to Harry Gulkin, Esquire, Varon, Bogenschutz, Williams and Gulkin, P.A., 2432 Hollywood Boulevard, Hollywood, Florida 33020.



OF COUNSEL

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

DOLORES B. GARBIN,	)	
	)	
Appellant,	)	CASE NO. 82-537
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

RESPONSE IN OPPOSITION TO MOTION FOR REHEARING

Appellee, the State of Florida, through undersigned counsel, responds in opposition to the motion for rehearing filed by the Appellant, and states:

1. The Appellant's lengthy motion is essentially a reargument of the two points she raised on appeal. These

points were fully addressed in the briefs and oral argument. Reargument is not the function of a motion for rehearing. Fla. R. App. P. 9.330(a).

2. This court's decision is consistent with the controlling caselaw, Ziegler v. State, 402 So. 2d 365 (Fla. 1981) and Tremain v. State, 336 So. 2d 705 (Fla. 4th DCA 1976). As discussed in Appellee's answer brief at pages 8-9, Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982) is inapplicable to the instant case. Thus, there is no need for this court to write an opinion as its decision did not create conflict in the law and there is no need to certify a question, since the question posed by Appellant was definitively answered in Ziegler.

Appendix 2

3. As to the Appellant's contention the evidence was insufficient, this issue has been thoroughly discussed previously. Suffice it to say that from the evidence the victim was shot first in the back while he was unarmed, lying in bed and obviously facing away from the Appellant, the jury could reasonably find the Appellant guilty of first degree murder.

WHEREFORE, the Appellee respectfully requests that the Appellant's Motion for Rehearing be denied.

Respectfully submitted,

JIM SMITH
Attorney General
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Appendix 3

/S/ JOY B. SHEARER
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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 16th day of March, 1983 by United States Mail to HARRY GULKIN, ESQUIRE, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

/S/ JOY B. SHEARER
OF COUNSEL